

No. 14354

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAMES H. SEWELL, Doing Business Under the Fictitious
Firm Name and Style of Burns Cuboid Company,
Petitioner,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

PETITIONER'S REPLY BRIEF.

MAURY, LARSEN & HUNT,
3460 Wilshire Boulevard,
Los Angeles 5, California,
Attorneys for Petitioner.

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Foreword.

The writer of the Federal Trade Commission's brief, it would seem, has not read the entire Record. In its Brief (p. 3) the F.T.C. sets forth certain of the Commission's findings as to advertisements made by us. Then in a note (Note 4, p. 3, F.T.C. Brief), the writer observes:

“Said findings of the Commission . . . are not contested by petitioner before this Court. . . .”

Since the Record [II R. 5-9, incl.] contains a detailed stipulation as to the advertisements promulgated by us, it would certainly ill-behoove us, to say the least, to contest findings of the Commission which are based specifically upon our own stipulation.

We have never denied the advertising and so, to save time and get to the merits in the most expeditious way we knew how, we simply agreed and stipulated that we had done the advertising in the language alleged.

This verbal stipulation also was not novel; in our Answer [I R. 15-26, incl.], there are contained the same admissions in substance as in the stipulation.

The promulgation of the advertising was never an issue.

I.

Re Statement of the Case.

The F.T.C.'s statement of the case is a fairly correct summary of the proceedings had before the matter reached this Court.

II.

Re Questions Presented.

The subject of dissertation by F.T.C. under this heading is confusing:

Part of the F.T.C.'s decision (designated as two decisions by the F.T.C.) is said to be "interlocutory, the other final" (F.T.C. Brief, p. 7). Just how this distinction is made or appears is not explained—nor what bearing this has—since on the next page, the F.T.C. says:

"This Court, of course, under its review powers can examine the interlocutory decisions rendered by the Commission to determine whether the Commission's rulings on alleged errors committed by the examiner are of such a nature as to materially affect the validity of the findings as to the facts and the order to cease and desist entered by the Commission."

We cannot see but that the F.T.C. is trying by procedural legerdemain to tell this Court that this Court cannot look all the way down the administrative ladder, but must stop at the Commission level, and can in no wise review the activities of the Hearing Examiner below that level.

Yet, upon the very next page (F.T.C. Brief, p. 8), the F.T.C. would have this Court infer from its statement that "exceptions"—as required by F.T.C. Rule XXIII C (3)—were not made during the course of the administrative procedure, and the F.T.C. infers to this Court that some issues were not presented to the Commission. To clarify this, we insert, as an appendix to this Brief, certain exactly quoted excerpts from our Brief before the Federal Trade Commission in this matter. Particularly, we insert the following exceptions:

"4. EXCEPTIONS TO PREJUDICIAL ERRORS IN PROCEDURE, INCLUDING CONDUCT AND RULINGS OF THE HEARING EXAMINER.

"I. Exception is taken to the denial of the Hearing Examiner of Respondent's Motions to Strike from the Record. (Spec. 1 to 38, incl.)

"II. Exception is taken to the Hearing Examiner's rejection of Respondent's Offers of proof as follows:

- (a) Testimonials: Exhibits 20 to 20Z-72, inclusive (for Iden.).
- (b) 260 Doctors' Prescriptions, Exhibits 19 to 19Z 259, inclusive (for Iden.).
- (c) U. S. Letters Patent No. 2,287,341, issued June 23, 1942, by the United States Patent Office to Wm. C. Burns [Ex. 18 for Iden.].

- (d) Testimony of Dr. Frank Glassman (offered in Chicago). Offer of Proof offered November 28, 1951, under Motion of Respondent to Reopen.
- (e) The conduct of the Hearing Examiner, *i. e.*, a crusader instead of a judge."

And we offered sixteen pages of argument to the Hearing Examiner's rulings in our Brief before the Federal Trade Commission.

In addition, oral exceptions during the course of the taking of testimony were ruled by the Hearing Examiner to be noted as to adverse rulings without counsel's asking for them [I R. lines 17-22, incl.].

Hence, we submit, petitioner's rights as to all rulings of the administrative body below, both interlocutory and final, and including but not limited to the Hearing Examiner's evidentiary rulings are now properly before this Court as "interlocutory rulings."

On page 8, note 5, of its Brief, the naked, unsupported statement appears:

"Errors made by the examiner are not, as such, subject to review by a court of appeals."

Since, on the same page, the Commission states:

"This Court . . . can examine the interlocutory decisions rendered by the Commission to determine whether the Commission's rulings on alleged errors committed by the Examiner are of such a nature as to materially affect the validity of the findings as to the facts and the order to cease and desist entered by the Commission,"

we submit that we are here dealing with the, in law, well known distinction without a difference.

Since the F.T.C. points to no actual issues which it now says were not specifically raised, we submit that the Court should be presented with the argument as to the merits as soon as possible.

Our statement of points to be relied upon is not, we admit, as specific as is our specifications of error. We have not, in order to save space and the Court's time, developed categorically each of the ten points set forth as our "Question Involved" (pp. 6-7 of our Op. Br.). However, we have not thereby abandoned them, inasmuch as the substance is discussed without repeating each point as a title.

The F.T.C. would delete six out of our ten questions involved and, as to them, it would argue that we are not before the Court.

We submit, with all due respect to the F.T.C., that these procedural points are:

(a) Not well taken; and

(b) Typical of the F.T.C.'s supererogation of verbiage used by it continually throughout all of these proceedings to endeavor to make *words* take the place of facts, reality, and ideas.

The F.T.C. on page 10 of its Brief almost misstates the actualities with reference to the cases by it there cited.

In the case of *Refrigeration Engineering, Inc. v. York Corp.*, 168 F. 2d 896, 899, a patent case, this Court stated that the issue which it would not review on appeal

was not contained in the pleadings, findings, statement of points to be relied upon, or specifications of error.

In the case of *State Farm Mutual Auto Ins. Co. v. Porter*, 186 F. 2d 834, this Court stated, on the Petition for Rehearing:

“No specification of error is assigned and the statement of points relied on does not mention any such point.”

Since the questions involved are by us raised in general in the statement of points to be relied upon [I R. 201-204], and more specifically in our specifications of error (Our Op. Br. pp. 8-11, incl.), it would appear that the F.T.C. is not within the facts of the Record.

On page 13 of its Brief, the Commission (to our considerable amazement) says that we point to no specific finding which is not supported by the evidence.

We do not know how to be more specific than we are upon page 10 of our Brief, in which we quote verbatim from the Findings as set forth at I R. 182, I R. 183, I R. 180, I R. 184, I R. 178, and so forth.

Our citations, we believe are not only direct quotations, but also specific as to volume and page of the Record.

III.

Argument.

If supported by *substantial* evidence, the F.T.C.'s findings *are* conclusive. We have never agued this rule of law; we do not now. The statute says so (F.T.C. Act, §5; 52 Stat. 112, 113; 15 U.S.C. §45 (c)). Our argument here is to the substance of the evidence.

Dr. Engh had not even enough knowledge respecting our device to know which side goes up in the wearer's shoe [II R. 40]. On cross-examination he reluctantly admitted that under certain circumstances the device might be of some relief to the wearer [II R. 40].

As *demonstrated* in our Opening Brief, this same phenomenon occurred time after time when the experts for the Commission were examined. Each expert sought to qualify and limit the occasions and circumstances under which relief would come, but each admitted relief would come, and each admitted the truth of our advertising claims.

The Commission's attorney, however, throughout the entire proceeding, warily refrained from asking what results might be achieved from over two hundred different sizes carried in stock which differentiated as to "thicknesses, widths, and lengths" [II R. 278—unrefuted testimony of James H. Sewell]. The Hearing Examiner refused to listen to Dr. Glassman as to whether a doctor is needed to fit the device to the foot, and the Commission gave, we submit, only lip service to a consideration of what Dr. Glassman might have said.

Dr. Lewin himself, according to his own testimony [IV R. 939-940] always sends the patient to a shoemaker to fit the peripheral pads or cross bars in the shoes.

We cannot agree with the Commission that "four well qualified medical experts testified (other than categorically) that the results claimed could not be obtained by use of the device." As we pointed out in our Opening Brief, the Commission is bound by the *cross-examination* testimony of its own experts as well as by the direct.

Dr. Lewin, the great authority—summoned by the Commission—and relied upon by the Commission—with respect to his use of peripheral wedges and bars under the ball of the foot (for callouses), stated [IV R. 932 *et seq.*]:

"Question: What is the purpose of putting pads and wedges in a patient's shoes?

Trial Examiner Haycraft: Let's find out if he does it before you ask him that question, if he has ever done it or prescribed it.

Mr. Maury: Very well.

By Mr. Maury: Q. Doctor, in the course of your practice of orthopedic surgery do you engage in the treatment of people's feet? A. Yes.

Q. And in the course of so doing do you utilize felt pads within their shoes? A. Yes.

Q. What is the purpose of that? A. Well, one purpose is to relieve them of discomfort.

Q. Surely. And sometimes you use pads made of other materials, do you not? A. No, I think we are limited entirely to felt.

Q. You are limited entirely to felt? A. I think ours is limited entirely to felt.

Q. I see. But other materials are used in the profession, are they not? A. Oh, yes.

Q. What are some of those other materials?
A. Rubber, chiefly.

Q. Rubber. Is aluminum ever used? A. Aluminum?

Q. Yes. A. Pads?

Q. Pads, wedges or shapes? A. I don't see how you could use an aluminum pad.

Q. You do not. How about monel metal?
A. That is not a pad; that is an arch support, but that is metal.

Q. You use metal in arch supports? A. I very rarely use it; in the old days I did.

Q. In your book which we have discussed, 'The Foot and Ankle,' you describe a great many of these treatments, do you not, Doctor? A. Yes, but you will find somewhere where I recommend the use of resilient material, and the two chief resilient materials are felt and rubber.

Trial Examiner Haycraft: Do you mean absorbent rubber—foam rubber.

The Witness: Sponge rubber. That is too soft, but of different grades of resiliency.

By Mr. Maury: Q. How much resiliency does felt have? A. Felt has a lot of resiliency.

Q. That is, this power to return to its original shape after pressure is released? A. Shape and size after the compressive force is released.

Q. Doctor, calling your attention to Pages 101 and following of your book which, of course, you must see, do you therein describe a number of modifications of shoes which are used by you in the practice of your profession? A. What is the question? Here they are illustrated here. What is the question?

Q. I will frame several questions: Will you describe what a Thomas heel is? A. A Thomas heel

is one where the inner border is longer than the outer border, and the inner border is higher than the outer border.

Q. And how is that affixed to the shoes? A. Glued on and nailed in.

Q. It is glued on, but where is it applied? A. To the heel.

Q. Inside the shoe or outside? A. Outside the shoe.

Q. What effect does that have? A. It tips the weight to the outer border of the foot?

Q. By elevating the inner border? A. That is right. This (indicating).

Q. Now, what is a Dutchman? A. A Dutchman is a name, I don't know where it got the name of Dutchman, but is it synonymous with the word 'Cockie,' which some use. It is usually a piece of material that is beveled, so that it is higher in one area than in another, and so far as I know it is a term used by shoe men, cobblers, and I guess they taught it to the shoe fitters, so that it is in common parlance now, that you can go into any cobbler and get a Dutchman put in the inner border of your shoe or the outer border of your shoe to shift your balance.

Q. What does it do? How does it shift that balance, Doctor? A. Well, if you put one under the outer border of your foot it will shift to the medial border; if you put one under the inner border of the heel or sole it will shift to the outer border.

Q. It elevates one side? A. It elevates one side, and then it is skived off so it gradually grades down to zero.

Q. When you elevate one side it shifts weight to the other doesn't it? That is elemental? A. To

some other side, because it can be beveled anteriorly and posteriorly towards the toes or towards the heel.

Q. What is a metatarsal bar, Doctor? A. A metatarsal bar is an object that is placed on the sole of the shoe, or between the layers of the sole of the shoe, just back of the metatarsal heads.

Q. Yes, sir. A. It is usually made of leather; it may be made of rubber or a composition. Q. What is the Lewin rubber metatarsal crescent, Doctor? A. Well, in World War II, at Camp Taylor, Kentucky, the thought occurred to me that in the Jones bar we were using a straight object to support a curved structure—

Q. Yes. A. (Continuing)—and therefor the idea struck me that that should be a curved object, that one should use a curved object to correct a curved structure or to support a curved structure.

Q. Yes. Doctor, you have illustrated these various types of devices on Page 103 of your book, have you not? A. Yes. There is the Jones bar, and there is the Lewin metatarsal crescent.

Trial Examiner Haycraft: Are you going to have a photostatic copy made of that?

Mr. Maury: I will ask leave of the Examiner to have Page 103 of the Doctor's book photostated and offer it in evidence.

Trial Examiner Haycraft: Mr. Reporter, that will be marked Respondent's Exhibit 29 for identification."

(The page referred to was marked Respondent's Exhibit 129 for identification.)

"Trial Examiner Haycraft: Is there any objection?

Mr. Bellinger: No objection.

Trial Examiner Haycraft: It may be received.”

(The page referred to, heretofore marked for identification Respondent's Exhibit 29, was received in evidence.)

“By Mr. Mary: Q. Calling your attention to this page, the diagrams demonstrate types of bars and pads? A. No, modification of shoes.

Q. Modification of shoes? A. Yes.

Q. What is the general purpose of these modifications of shoes? A. To relieve people of weight bearing on certain areas, to give them some degree of comfort, and to balance their feet more properly.

Q. You have found throughout your experience that these devices are effective in that respect? A. Yes, sir.

Q. Calling your attention to Commission's Exhibit 3 in evidence, and to the forward section thereof, can you tell us whether there is any similarity between that and the Lewin rubber metatarsal crescent illustrated in your book on Page 103? A. Whether there is any similarity?

Q. Yes, sir. A. Between what?

Q. Between the Lewin rubber metatarsal crescent and the device now before you? A. This goes on the bottom of a shoe?

Q. It goes on the bottom of a shoe? A. Yes.

Q. But it does have the effect of raising that area slightly, does it not? A. That is right.

Q. And what would be the effect of— A. Wait a minute. You said it has the effect of raising it?

Q. Raising that area of the foot? A. Oh, it isn't for that purpose.

Q. What is the purpose of that? A. The purpose is to transmit the weight from the heel to an area back of the metatarsal heads and relieve those heads of pressure.

Q. I see. And it does that by elevating the area back of the metatarsals, does it not? A. I don't know that it elevates it. It is a weight-bearing point, so that the person transmits his weight from the heel to an area just back of the metatarsal heads, instead of having the weight come down on the metatarsal heads.

Q. I see. A. It is sometimes called an anterior heel, that the ordinary heel that the shoe comes with is the posterior heel, and this is an anterior heel over which the foot rocks, but so far as pushing up on anything, I don't know that that occurs. I tried to do it, but when it is attached to the shoe it is just another weight-bearing point.

Q. But it does transfer weight? A. From the heel to the forefoot.

Q. Does it transfer any weight from the metatarsal heads to the points back of them? A. No, it is to relieve pressure or weight on the metatarsal heads.

Q. Then it takes weight off the metatarsal heads? A. That is right.

Q. What effect would that have on callouses of the metatarsal arch area? A. It might help, it should help them.

Q. Have you used them for that purpose, Doctor? A. Yes.

Q. That is a very frequent prescription, is it not? A. Yes.

Q. You do prescribe these things for various persons? A. Individually.

Q. Individually? A. Always.

Q. But you send them to the shoemaker to have them executed, do you not? A. That is right.

Q. Is the same true of the other devices which you depict on that page, Doctor, that you prescribe them for various patients? A. I prescribe some of them. That was an illustration of the principal ones.

Q. Yes. A. I don't know that any one person uses all of those.

Q. Surely. But they may be used in combination, too, may they not? A. Yes.

Q. Depending on the person's foot? A. That is right.

Q. And the object is to give the person relief from foot pains? A. That is one of the purposes, to give them relief from discomfort.

Q. And to aid them in balance, is it not, Doctor? A. Yes.

Q. And to perhaps improve his stance? A. Yes.

Q. Also to take weight-bearing off of sensitive parts of the feet? A. Yes.

Q. And to transfer it to other parts of the feet? A. Yes, sir.

Mr. Maury: I would like also to offer in evidence some of the material in the book. Perhaps I could do it by the question and answer method, if you prefer.

Trial Examiner Haycraft: I would rather you would.

Mr. Maury: Very well. I will try to do that. It is going to be chiefly reading from the book and asking the witness if he stands by that statement, and I might just ask him this general question?

By Mr. Maury: Q. Doctor, with reference to your dissertation upon modifications of shoes in your

book, in your 1947 Edition, do you consider that truthful and adequate as of the present day? A. I think so.

Q. Thank you. Then may I read it into the record?

Trial Examiner Haycraft: Yes.

Mr. Maury: I will read into evidence the dissertation and also offer the other diagrams shown by a photostatic copy.

Trial Examiner Haycraft: Do you have any more than you have already called attention to?

Mr. Maury: Yes, Figure 41 on Page 104.

Trial Examiner Haycraft: Mr. Reporter, that will be marked Respondent's Exhibit 30."

Dr. Lewin's methods, it would seem, on cross-examination, parallel our own. Dr. Lewin modifies shoes [IV R. 937]. We sell modifying inserts. He might easily have been the ad writer as well as the inventor!

If a million buyers have derived comfort by the use of Dr. Lewin's devices, as used in our 200 combinations, and if no member of the public has a complaint, can it not be rationally said that the naked, conclusory, categorical opinions of the experts, as distinguished from their specific experience and practice, as shown by their cross-examination, constitute insubstantial evidence?

The Commission has tacitly acceded to our statement of the "substantial evidence" rule (F.T.C. Brief, p. 11). The Commission's experts, we most sincerely feel, proved positively our contentions. And this evidence in our favor, *adduced by the Commission itself*, and by which the Commission was bound under the law, was utterly disregarded.

The "absolute rebuttal" by Dr. Philip Lewin of Doctors Hiss and Garner as to the effects of a Thomas bar [IV R. 846-848] relied upon by the F.T.C. shows clearly that there may be some confusion in the profession as to what is meant by a Thomas bar; but when we become more specific in definition and use, the bar across the ball of the foot just behind the metatarsal heads without designation as to whether it is Thomas' or Jones', we find Dr. Lewin, on page 847, calling it a Jones bar and stating that it "is a strip of metal on the bottom of the shoe sometimes attached to or incorporated in the sole of the shoe. It is a straight object that goes behind the first and fifth metatarsal bones. That is, the heads of them, and that is the Jones bar."

Dr. Lewin distinguishes the Thomas heel as a different device altogether. At IV R. 934, he again states that a Thomas heel "is one where the inner border is longer than the outer border and the inner border is higher than the outer border."

Further [IV R. 935], Dr. Lewin states that "a metatarsal bar is an object that is placed on the sole of a shoe or between the layers of the sole of a shoe just back of the metatarsal heads."

Dr. Lewin defines his own invention, the Lewin Rubber Metatarsal Crescent, as a curved type of support evolved by him to support a curved structure. It is illustrated as Respondent's Exhibit 29 in Evidence.

Consequently, while Dr. Lewin did undoubtedly clear the Record as to the meaning of a Thomas bar, he also proved that a metatarsal bar or crescent is his own prescription and invention for callouses, just as we use it.

IV.

Balance.

We agree with the F.T.C. that “words mean what people understand them to mean” (*Benton Announcements v. Federal Trade Commission*, 130 F. 2d 254, 255); and also that it does not matter much what we understand the word “balance” to mean. It is what the ordinary use of the word means, and not the complicated meaning given it by the F.T.C. and the experts. When we want to know what a word means, we look it up, and we find that Webster’s dictionary (Webster’s New International Dictionary, 2nd Ed. Unabridged 1950, Copyright G. & C. Merriam Co.) is an excellent authority. “Balance,” according to Webster, has a rather extended series of meanings, both as a noun and a verb. We do not feel that either the accounting meaning of the word or the hyper-technical anatomical meaning is involved in our advertising. We do feel that where we say “balance” in our advertising, or body balance, we imply to the general public that we make it easier for the wearer to stand on his feet. At least, that is what we are trying to imply, and we are not (as we believe the F.T.C. is) like Humpty Dumpty in “Alice Through the Looking Glass,” trying to make words mean what we choose them to mean, “neither more or less,” nor are we trying to be the master of the word.¹

¹“ ‘Certainly,’ said Alice.

“ ‘And only *one* for birthday presents, you know. There’s glory for you!’ (said Humpty Dumpty).

“ ‘I don’t know what you mean by “glory.” ’ ” Alice said.

“Humpty Dumpty smiled contemptuously. ‘Of course you don’t —till I tell you. I meant “there’s a nice knock-down argument for you!” ’

It is still true that a pyramid balances better on its base than on its point. So long as the under-foot is rounded in contour, wedges at the side will aid balance—and all the verbiage of the Commission's experts cannot alter the facts of nature.

V. Fair Trial.

The F.T.C. has in no wise answered our contentions here. It mistakes constitutionality for fairness. Nowhere have we raised the issue of the constitutionality of the F.T.C. Act, the F.T.C., or these proceedings.

We do, however, contend that the whole process—as it *has occurred in this case*—has resulted in an unfair hearing for our client. And it should be here noted parenthetically that the “dual function” of the F.C.T., mentioned by the courts (*National Harness Mfrs. Assn. v. Federal Trade Commission*, 268 Fed. 705, 707; *Federal Trade Commission v. Klesner*, 280 U. S. 19, 27), has in this case become a *triple* function. F.T.C. here, in addition to being both prosecutor and judge, is also the complaining witness (and insofar as F.T.C. makes its own rules, it is a legislature too). The unfairness is our point; constitutionality was by the courts settled long ago. Un-

“‘But “glory” doesn't mean “a nice knock-down argument,”’ Alice objected.

“‘When *I* use the word,’ Humpty Dumpty said, in rather a scornful tone, ‘It means just what I choose it to mean—neither more nor less.’

“‘The question is,’ said Alice, ‘whether you *can* make words mean so many different things.’

“‘The question is,’ said Humpty Dumpty, ‘which is to be master—that's all.’” (Alice Through the Looking Glass, by Lewis Carroll.)

fairness can occur in any tribunal, regardless of the constitutionality of the forum. We submit it has here.

As was said by this Court in the case of *Carter v. Federal Trade Commission*, 201 F. 2d 446:

“We are of the opinion, however, that the cumulative effect of these unjustifiable restrictions on the cross-examination of key witnesses for the Commission was to deprive the petitioner of a fair hearing. Such being the case, the court is not disposed to speculate as to what would have been the outcome had a fair and impartial hearing been accorded.”

Citing:

Inland Steel v. N.L.R.B., 7 Cir., 109 F. 2d 9;

Empire Oil & Gas Co. v. U. S., 9 Cir., 136 F. 2d 868, 871;

Willapoint Oysters v. Ewing, 9 Cir., 174 F. 2d 676, cert. den. 338 U. S. 860, 70 S. Ct. 101, 94 L. Ed. 577;

Cf. Reilly v. Pincus, 338 U. S. 269, 70 S. Ct. 110, 94 L. Ed. 63.

Conclusion.

It is respectfully submitted that the decision and order of the Federal Trade Commission should be set aside.

MAURY, LARSEN & HUNT,

By GEORGE R. MAURY,

Attorneys for Petitioner.

APPENDIX.

Quotation From Respondent's Brief on Appeal to the Commission (de hors the Record).

B. Exceptions.

1. EXCEPTIONS TO SPECIFIC FINDINGS.

The Respondent makes the following exceptions to specific Findings of the Hearing Examiner as follows:

I.

As to the rulings on proposed Findings and Conclusions submitted by the attorney in support of the Complaint, the Respondent excepts to the rulings of the Hearing Examiner in allowing the Findings proposed in paragraph numbered Four of Mr. Bellinger's proposed Findings for that said Finding is vague, in that it cannot be determined what "allowed in substance" means, and in that it is contrary to the preponderance of the evidence, and in that it is based upon evidence which is incredible and based upon the Hearing Examiner's refusal to hear evidence which was offered.

II.

The Respondent excepts to the Hearing Examiner's allowing paragraph Nine of the Findings, etc. proposed by Mr. Bellinger on the following grounds: That said Finding is vague in that it cannot be determined therefrom what "allowed in substance" means when applied to paragraph Five; on the further ground that the Finding is contrary to the preponderance of the evidence and is not supported by any credible evidence whatsoever.

III.

The Respondent excepts to the Conclusion proposed by Mr. Bellinger and "allowed in substance" on the fol-

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III.

The Respondent excepts to the Conclusion proposed by Mr. Bellinger and "allowed in substance" on the fol-

lowing grounds: That the Conclusion is vague in that it cannot be determined what "allowed in substance" means, and in that the Conclusion itself is not a proper Conclusion to be drawn from the evidence or from proper Findings; and on the further ground that the advertisements of the Respondent do not deceive the public and they do not constitute unfair and deceptive acts or practices in commerce or otherwise within the intent and meaning of the Federal Trade Commission Act.

IV.

Each and all of said Findings are based upon evidence which was inadmissible and should have been stricken from the record under a proper application of the Hearing Examiner's own rulings with reference to Respondent's evidence.

2. EXCEPTIONS TO RULINGS ON RESPONDENT'S FINDINGS.

Exceptions in this category follow the numerical designations of Respondent's Proposed Findings of Fact and Conclusions of Law, and the same designations made by the Hearing Examiner in his ruling on Respondent's proposed Findings.

V.

While Finding V proposed by Respondent is negative, nevertheless an examination of the complete record reveals that there is absolutely no evidence whatsoever concerning other or different advertisements than those set forth and, therefore, exception is taken to the denial of the Hearing Examiner of this proposed negative finding.

VI.

As to Finding Numbered VI(1), (7), (8), (9), (12), (13), (14), (16), (17), (18), (19), (22), (23), (24), (25), and (26), the Respondent makes the following specific exceptions as to each of the foregoing Findings subnumbered under VI: Each of said proposed Findings of the Respondent is supported by substantial, reliable and probative evidence, and the Federal Trade Commission by Mr. Bellinger failed to sustain the burden of proof to the contrary throughout the entire hearings; and on the further ground that the truth of the matter is pragmatically established; on the further ground that the Hearing Examiner refused to admit evidence probative of the truth of each of said statements after offers of proof were duly made.

As to the following special Findings under the major numeral VI, the Respondent makes the following specific exceptions:

VI(2) is excepted to upon the ground that the only evidence in the record is that this statement was discontinued by the Respondent at the request of the Federal Trade Commission. [Tr. p. 656.]

VIII.

As to VIII, the Respondent specifically excepts to the denied portion thereof; that is to say, he excepts to the denial by the Hearing Examiner as to the truth of the proposed Finding not being supported by substantial, reliable and probative evidence; he also excepts to the vagueness of the ruling on the ground that no discrimination is made between body balance and foot balance; on the further ground that the proposed Finding is not supported by the evidence and the preponderance of the evi-

dence is to the contrary, namely, that representations that the device will assist the wearer to attain better body balance are true and that the representations that the device will assist the wearer to attain better foot balance are likewise true.

XII.

Exception is taken to the vagueness of the statement of the Hearing Examiner in that it cannot be determined what is meant by “and denied as to the limited extent of the representation” in that no limit is set forth by the Hearing Examiner by which a standard may be set up; and on the further ground that the truth of the representations has been established by the preponderance of the evidence; and on the further ground that the same is contrary to the Finding of the Hearing Examiner under number X in his Findings.

XIII and XIV.

Respondent specifically excepts to these on the ground that the preponderance of the evidence is to the contrary of the ruling of the Hearing Examiner, and the truth of the advertising is supported by substantial, reliable and probative evidence.

XVI.

Respondent excepts to the Hearing Examiner’s ruling under XVI on the ground that it is contrary to the weight of the evidence, that the representation is true, and that it is supported by substantial, reliable and probative evidence.

XVII.

Respondent excepts to this Finding on the ground that it is contrary to all of the evidence and that no Finding

has been made on the cessation of the use of the representation.

XVIII.

Respondent excepts to the Finding of the Hearing Examiner on the ground that the truth of the representation is established by all the medical testimony that was produced, and on the ground that the preponderance of the evidence is to the contrary.

XIX.

Respondent excepts to this Finding on the ground that the preponderance of the evidence is to the contrary.

XX.

Respondent excepts to this Finding on the ground that the preponderance of the evidence is to the contrary, and the statement is supported by sound, substantial, reliable and probative evidence.

XXI.

Respondent excepts to this on the ground that all of the medical witnesses agreed as to the truth of this representation and that all of the evidence including the preponderance is to the contrary of the Hearing Examiner's Finding.

XXII.

Respondent excepts to this upon the ground that all of the evidence is to the contrary.

XXIV.

Respondent excepts to this on the ground that this is contrary to the preponderance of the evidence and contrary to the Hearing Examiner's Finding numbered X.

XXVI, XXVII, XXVIII, XXIX, XXX, XXXIII, XXXIV, XXXV, XXXVI, XXXIX, XL, XLI, XLII, XLV.

Respondent excepts to these on the ground that each and all of the foregoing rulings of the Hearing Examiner are contrary to the preponderance of the evidence and contrary to the experience of the only witnesses who testified and said Findings are based upon irrelevant and inadmissible testimony which should have been stricken.

XXXI and XXXII.

Respondent excepts to these on the ground that the whole point of the case is contained in this Finding in essence, and that the description by the Hearing Examiner of the same as “meaningless and irrelevant” indicates the lack of understanding of the Hearing Examiner of the uncontroverted evidence produced.

XLIII.

Respondent excepts to this ruling on the ground that the evidence upon which said proposed Finding is based goes to the essence of the transaction of purchase by the public.

XLIV.

Respondent excepts to this ruling of the Hearing Examiner on the ground that the preponderance of the evidence is to the contrary.

XLV.

Respondent excepts to this ruling of the Hearing Examiner on the ground that all of the medical testimony produced supports this proposed Finding.

As to Respondent's proposed Conclusions of Law, the Respondent excepts to the failure of the Hearing Ex-

aminer to make any ruling as to Respondent's proposed Conclusions of Law except by implication, and excepts to the implied refusal to sustain the Conclusions proposed by Respondent.

3. EXCEPTIONS TO INITIAL DECISION.

Respondent excepts to the Initial Decision of the Hearing Examiner as follows:

I. Respondent excepts to the finding of the Hearing Examiner as to the facts on the following grounds: (a) That the description of the device is not accurate in that it is too generally stated "where the elevations along its sides" are located in defining them only "where the sides of the wearer's heel are raised by such elevations." This indicates the Hearing Examiner's lack of definite knowledge, understanding, and complete study as to the structure of the device.

II. Respondent excepts to the specific Finding in paragraph Four (f) and (g) on the ground that nearly six years have elapsed since the respondent ceased using these representations in order to cooperate with the Federal Trade Commission, and that to insert them in any decision whatever now, or to make any issue whatsoever of them, is nothing but administrative persecution.

III. As to paragraph Five, Respondent's exception is taken to the derogatory remarks of the Hearing Examiner as follows: "And another doctor. an osteopath" in that the Hearing Examiner fails to state that this osteopath is also a medical doctor, and the most experienced foot specialist produced by either side.

IV. Specific exception, of course, is taken to paragraph Five where it is found that the statements involved

constitute false advertisements. This is a conclusion, not a finding, and is not supported by the evidence, nor is it in accord with the preponderance of the evidence.

V. Exception is taken to paragraph Six upon the ground that it describes only body balance upon the foot, called stance, and does not deal with any foot function dynamically, and any finding that the Respondent's device does not assist in balancing the foot and in that it injects into the advertising a meaning to the word "balance" which is not there in ordinary lay understanding and then proceeds to find that such interpolated meaning is not true. Exception is also taken to the Finding therein that the cuboid bone is not the focal point of weight bearing, either in stance or locomotion as being contrary to all the medical testimony.

VI. Respondent excepts to paragraph Seven upon the ground that said paragraph is entirely a conclusion of the Hearing Examiner and not a finding of fact; also on the ground that paragraph Seven is contrary to the allowed finding proposed by the Respondent; and contrary to the testimony of all of the physicians and interpolates into itself or its reason for being many of the representations which have been voluntarily discontinued by the Respondent in order to cooperate with the Federal Trade Commission and with respect to the effect of the device upon calloused feet conditions, it is directly contrary to all of the evidence.

VII. Exception is taken to the so-called Conclusion upon the ground that it is entirely in the words of the statute and in nowise descends to particulars, and does not explain its meaning as applied to this device.

4. EXCEPTIONS TO PREJUDICIAL ERRORS IN PROCEDURE,
INCLUDING CONDUCT AND RULINGS OF THE HEARING
EXAMINER.

I. Exception is taken to the denial of the Hearing Examiner of Respondent's Motions to Strike from the Record. [Spec. 1 to 38, incl.]

II. Exception is taken to the Hearing Examiner's rejection of Respondent's Offers of proof as follows:

- (a) Testimonials: Exhibits 20 to 20Z-72, inclusive (for Iden.).
- (b) 260 Doctors' Prescriptions, Exhibits 19 to 19-Z-259, inclusive (for Iden.).
- (c) U. S. Letters Patent No. 2,287-341, issued June 23, 1942, by the United States Patent Office to Wm. C. Burns [Ex. 18 for Iden.].
- (d) Testimony of Dr. Frank Glassman (offered in Chicago). Offer of Proof offered November 28, 1951, under Motion of Respondent to Reopen.
- (e) The conduct of the Hearing Examiner, *i. e.*, a crusader instead of a judge.

5. EXCEPTIONS TO FAILURE OF THE INITIAL DECISION
TO INCLUDE OTHER FINDINGS AND CONCLUSIONS.

I. Exception is taken to the failure of the Initial Decision to describe more accurately the device.

II. Exception is taken to the failure of the Initial Decision to explain understandably the function of the device.

III. Exception is taken to the failure of the Initial Decision to find the truth of the affirmative allegations in Respondents' Answer and foot diagram thereto attached,

showing the focal point of weight pressure passing under the cuboid bone when the foot is in action. (This was established by *all* the doctors.)

IV. Exception is taken to the failure of the Initial Decision to find that the medical profession generally accepts the device, prescribes it, and holds that no necessity exists for any orthopedic prescription, in the usual case of foot pain.